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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAYNARD HATLEBERG, JR., Defendant and Appellant.	G039314 (Super. Ct. No. 04SF0739) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Ivy B. Fitzpatrick, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Maynard Hatleberg, Jr., of second degree murder (Pen. Code, § 187, subd. (a))[1] while personally using a knife (§ 12022, subd. (b)(1)) in the stabbing death of his girlfriend, Deborah Williams. Defendant contends the trial court erred when it failed to instruct the jury on involuntary manslaughter as a lesser-included offense of murder. He also argues the instructions on voluntary manslaughter (Judicial Council of Cal. Crim. Jury Instns. (2008) CALCRIM Nos. 570 and 571) violated his due process rights by creating an impermissible presumption in favor of a murder verdict, and the instruction on other acts of domestic violence (CALCRIM No. 852) impermissibly informed the jury it could convict defendant based solely upon this evidence. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Williams moved into her condominium shortly after they began their tumultuous three-year relationship. The arrangement started off well, but spiraled downward into regular verbal and physical altercations. Both defendant and Williams chronically abused alcohol, prescription narcotics, and methamphetamine. Defendant did not have steady employment and relied on Williams for financial support. Neighbors witnessed numerous boisterous arguments, which often occurred when they were drinking. Reconciliation and overt signs of affection would typically surface afterward.

The intensity and frequency of fighting increased in the months leading up to the homicide. Williams often would order defendant to move out, but he ignored her demands. Williams told her mother and her daughter defendant threatened her and

[1] All statutory references are to the Penal Code unless otherwise indicated.

warned "if she called the police he would have somebody take care of her." In the weeks before the murder, Williams and her daughter devised a scheme to break away from defendant. The plan included refinancing William's condominium to fund her escape and pay for a new life. On July 4, 2004, Williams told her daughter she had taken steps to secure refinancing.

In the late afternoon of July 10, 2004, defendant and Williams engaged in another loud and heated argument. The argument subsided and defendant left to purchase lighter fluid for the barbecue. Defendant had begun drinking at 11:00 a.m., and he continued to drink, joined by Williams. Around 6:00 p.m., defendant fixed his dinner on the barbeque in the patio, and ate his meal while sitting on the edge of his bed, eating off a cutting board because the couple had no dining table. They continued to drink beer, wine, and whiskey and bicker throughout the early evening.

Defendant left again for the store and the couple resumed arguing when he returned. Later that evening, defendant left to share drinks with his friends in the complex.

Williams confronted defendant when he returned from his visit and accused him of seeing another woman. Defendant became angry and started to walk away. Williams struck defendant on the back of the head with the cutting board. Defendant went "ballistic" and shoved Williams onto the bed. Williams grabbed two knives from the cutting board, each 10 to 12 inches long. She swung them at him and he charged her. He fell on top of her on the bed and began grabbing for the knives. According to defendant, everything happened quickly, explaining, "[S]omehow, I believe I hit her arm or somehow got control, and she got stabbed in the neck." Williams suffered four stab wounds to her neck, including a deep wound to her carotid artery, and several defensive

wounds on her hands. Defendant told her not to move and tried to put pressure on the wounds. He ran from the room to grab the phone, but the cord had been pulled out of the wall during an earlier fight. When defendant returned to the bedroom, Williams was dead. Defendant left Williams's body on the bed and covered it with blankets. He locked the apartment and fled. He turned himself in at a local police station several days later. In his statement, he did not tell police Williams hit or attacked him, never mentioned the cutting board, or that Williams held or swung knives at him.

Following a trial in May 2007, the jury found defendant guilty of second degree murder and that he personally used a knife. On August 10, 2007, the court sentenced defendant to an indeterminate term of 15 years to life in prison for second degree murder, plus a consecutive one-year term for the deadly weapon enhancement.

II

DISCUSSION

A. *The Evidence Did Not Support a Jury Instruction on Involuntary Manslaughter*

Defendant contends the trial court erred in failing to instruct the jury sua sponte on involuntary manslaughter as a lesser included offense of murder. We disagree.

Involuntary manslaughter occurs where the defendant unlawfully kills a human being without malice in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (§ 192, subd. (b).) Defendant asserts substantial evidence supported two theories of involuntary manslaughter: (1) defendant killed the victim while committing the misdemeanor offense of brandishing

a knife (§ 417),[2] an unlawful act not amounting to a felony; or (2) he acted with criminal negligence in wielding the knives at Williams.

No substantial evidence supported the notion the homicide occurred while defendant drew or exhibited the knives, or used them during the fight unlawfully within the meaning of section 417. Defendant testified Williams threatened him with the knives after he shoved her onto the bed, and she suffered her fatal injuries during his attempt to wrest them away.

Defendant's reliance on *People v. Lee* (1999) 20 Cal.4th 47 is unavailing. There, the defendant retrieved a gun from the bedroom and returned to the kitchen to renew an argument with his wife. (*Id.* at p. 53.) The Supreme Court concluded the defendant was entitled to a misdemeanor manslaughter instruction because substantial evidence showed the killing occurred unintentionally while *defendant* brandished the gun. (*Id.* at pp. 60-61.) In contrast to the facts in *Lee*, here there is no substantial evidence the homicide occurred while defendant brandished the knives.

Defendant argues there was substantial evidence he lawfully resorted to self-defense, but responded in an unlawful manner by using excessive force. As defendant explains, he "reasonably was defending himself but used more force than was warranted" and therefore acted without due caution and circumspection. Defendant's theory is untenable. Simply put, defendant's act is not "lawful" if he unintentionally killed the victim using excessive force. The crime, at a minimum, constitutes voluntary

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[2] Section 417, subdivision (a)(1), provides: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor, punishable by imprisonment in a county jail for not less than 30 days."

manslaughter because his conduct demonstrates a conscious disregard for human life. (See *People v. Blakeley* (2000) 23 Cal.4th 82, 85; *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

Even assuming the trial court erred in failing to instruct on involuntary manslaughter, any omission was harmless. Here, the jury convicted defendant of second degree murder, defined by the court as the unlawful killing of a human being with malice aforethought, but without deliberation and premediation. (CALJIC No. 8.30.) The court instructed that malice was either express or implied, explaining that a defendant acts with express malice when he "unlawfully [intended] to kill" and acts with implied malice by intentionally committing an act he knows is dangerous to human life and does so with conscious disregard for life. (CALCRIM No. 520.) The court also instructed on the lesser included offense of voluntary manslaughter based on heat of passion, defined as an unlawful killing without malice where defendant was provoked to act rashly and under the influence of intense emotion that obscured his judgment, and the provocation would have caused a person of average disposition to act rashly and without due deliberation. (CALCRIM No. 570.) The court also instructed on voluntary manslaughter based on imperfect self-defense, explaining that the crime occurs when the defendant acts with an actual but unreasonable belief in the need for to defend oneself. (CALCRIM No. 571.)

Defendant's conviction of second degree murder reflects the jury's determination malice had been proven beyond a reasonable doubt thereby precluding a verdict for defendant on voluntary manslaughter. Given the jury's rejection of voluntary manslaughter, which carries a higher degree of culpability than involuntary manslaughter, it logically follows there exists no reasonable probability the jury would have returned an

involuntary manslaughter verdict had it been given that option. (*People v. Rogers* (2006) 39 Cal.4th 826, 884.)

B. *CALCRIM Nos. 570 and 571 Do Not Create a Presumption in Favor of a Murder Verdict*

Defendant argues the voluntary manslaughter instructions, CALCRIM Nos. 570 and 571, create an improper presumption in favor of a murder verdict because they reference "the notion that a manslaughter verdict requires a *reduction* of the homicide *from* murder." He asserts these instructions "impermissibly intrude[] into the deliberative process and create[d] an improper *presumption* that a homicide is murder rather than manslaughter, instead of allowing the jurors to begin deliberations with all levels of crime submitted to them deemed worthy of even-handed consideration."(Original italics.) We do not find this contention persuasive.

CALCRIM No. 570 provides in pertinent part, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion." The instruction then defines these concepts, again using the word "reduce." The instruction concludes that "the People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." CALCRIM No. 571 contains parallel language for imperfect self-defense.

The prosecution must prove every element of an offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) This constitutional principle is undermined, however, when a court instructs the jury to find an element of the offense has been established upon proof of another fact. The instruction is unconstitutional because it conflicts with the presumption of innocence and relieves the

prosecution of its burden to prove every element of the offense beyond a reasonable doubt. (*Carella v. California* (1989) 491 U.S. 263, 265.) But CALCRIM Nos. 570 and 571 do not direct the jury to find defendant guilty of murder unless they are convinced to reduce the offense to manslaughter. Rather, these instructions correctly informed the jury that voluntary manslaughter, as a *lesser* included offense of murder, *is* a reduced form of homicide. As explained in *People v. Manriquez* (2005) 37 Cal.4th 547, "[a]n unlawful killing with malice is murder. (§ 187.) Nonetheless, an intentional killing *is reduced to voluntary manslaughter if other evidence negates malice*. Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation (§ 192, subd. (a)), or kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. [Citation.] Only these circumstances negate malice when a defendant intends to kill. [Citation.]' [Citation.]" (*Id.* at pp. 639-640, italics added.)

The court instructed the jury on the presumption of innocence and to acquit defendant unless the prosecution proved his guilt beyond a reasonable doubt. (CALCRIM No. 220.) Jurors were also told the prosecution had the burden of proving beyond a reasonable doubt that defendant did not kill as a result of sudden quarrel or heat of passion or in imperfect self-defense. (CALCRIM Nos. 570 & 571.) Finally, the court told jurors to consider the instructions together. (CALCRIM No. 200.) We assume jurors understood and followed the court's instructions. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) Taken as a whole, the instructions would not mislead jurors to presume, as defendant argues, that he committed murder unless "someone convinced them they should 'reduce' it."

Defendant's reliance on *People v. Owens* (1994) 27 Cal.App.4th 1155 is misplaced. There, in a prosecution for continuous sexual abuse of a child (§ 288.5), the trial court instructed the jury the prosecution had introduced evidence "'tending to prove'" there were more than three acts of substantial sexual conduct, and that the defendant could be found guilty if the proof showed beyond a reasonable doubt, and the jury unanimously agreed, that defendant committed three such acts. The appellate court held the trial court erred in using the phrase "'tending to prove'" because it carried the inference the prosecution had established the defendant's guilt and thereby relieved the prosecution of its burden of proving guilt beyond a reasonable doubt.

Nothing similar occurred in this case. The instructions did not carry an inference the prosecution had established defendant's guilt of murder, nor did they relieve the prosecution of its burden of proving guilt beyond a reasonable doubt. The contrary is true. The trial court did not err in instruction with CALCRIM Nos. 570 and 571.

C. *CALCRIM No. 852 Does Not Unconstitutionally Lower the Prosecution's Burden of Proof*

The trial court admitted evidence defendant had committed uncharged acts of domestic violence against two former girlfriends[3] (Evid. Code, § 1109) and instructed the jury on how to consider this evidence, per CALCRIM No. 852.[4] Defendant argues

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[3] Karen K., a former girlfriend of 19 years and mother of defendant's three children, and Rena M., defendant's former roommate, testified to several acts of aggressive and violent behavior by defendant.

[4] CALCRIM No. 852 provides: "The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: Assault, Battery and Violation of Restraining Order against Karen [V.] and Assault [and] Battery against Rena [M.] [¶] Domestic violence means abuse committed against an adult/who is a former cohabitant or person with whom the defendant has had a child. [¶]

the instruction deprived him of his due process right to proof beyond a reasonable doubt because it encouraged the jury to find him guilty of the charged offense solely upon finding by a preponderance of the evidence that he committed the uncharged domestic violence offenses. We disagree.

Ordinarily, evidence of prior criminal acts is inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.) The Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109). Our Supreme Court has held that Evidence Code section 1108 meets the requirements of due process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915.) Following *Falsetta*, courts have applied the same reasoning and upheld the constitutionality of Evidence Code section 1109. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1312; *People v. Price* (2004) 120 Cal.App.4th 224, 240.)

In *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 (*Reliford*), our Supreme Court addressed the issue of whether CALJIC No. 2.50.01 concerning evidence of the defendant's uncharged sex crimes improperly lowered the burden of proof necessary to

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. . . [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit murder as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder. The People must still prove each element of every charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose except for the limited purpose of determining the defendant's credibility."

convict the defendant. The court held no reasonable jury would interpret the jury instruction to authorize a guilty verdict on the charged offense on the basis of the lower standard of proof applied to the evidence of other uncharged sexual offenses. (*Reliford,* at p. 1016; see *People v. Schnabel* (2007) 150 Cal.App.4th 83 [rejecting challenge to substantially identical CALCRIM No. 1191 based on *Reliford*].)

In *People v. Johnson* (2008) 164 Cal.App.4th 731, the court rejected the defendant's argument CALCRIM No. 852 "'"wholly swallowed the 'beyond reasonable doubt' requirement." . . .'" (*Johnson,* at pp. 739-740.) *Johnson* held *Reliford* had rejected the argument in upholding the constitutionality of the 1999 version of CALJIC No. 2.50.01, and the version of CALJIC No. 2.50.01 considered in *Reliford* was similar in all material respects to CALCRIM No. 852. (See also *People v. Reyes* (2008) 160 Cal.App.4th 246, 251 (*Reyes*); *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1097 [no material difference between CALJIC No. 2.50.01 and CALJIC No. 2.50.02, the analog to CALCRIM No. 852]; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

These cases hold CALCRIM No. 852 does not lower the prosecution's burden of proof. As in *Reyes*, defendant relies on cases addressing a prior version of CALJIC No. 2.50.02. (*People v. Frazier* (2001) 89 Cal.App.4th 30; *People v. Younger* (2000) 84 Cal.App.4th 1360; *People v. James* (2000) 81 Cal.App.4th 1343.) He does not mention more recent authority, including *Reliford*, which is the only Supreme Court decision that directly addresses defendant's claim. The Supreme Court emphasized that nothing in the instruction would lead a reasonable jury to use the preponderance of the evidence burden of proof for anything but the preliminary determination of whether the defendant had committed a previous assault. (*Reliford*, *supra*, 29 Cal.4th at p. 1016.)

For the foregoing reasons, we reject defendant's claim that CALCRIM No. 852 improperly lowered the prosecution's burden of proof.

III

DISPOSITION

The judgment of the trial court is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.